IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Second Appeal No.1259 of 2005
with
Civil Application No.1919 of 2005

Shri Manohar Parshuram Ghare ..Appellant

vs.

1. Hanmant Parshuram Ghare
(deceased) through heirs
1A.Smt.Sunanda Hanmant Ghare
and others ..Respondents

Shri S.D.Thokade for appellant.
Shri P.J.Pawar for respondent no.1A to 1E, 2 and 4

CORAM: S.C.DHARMADHIKARI J.
11th July, 2007

P.C.

1. Admit. Learned Counsel appearing for the respondents waive service. Heard finally by consent. Paper book dispensed with. The substantial question of law raised in this second appeal is:

> "Whether the First Appellate Court was obliged to pass an order on application under Order 41 Rule 27 of Code of Civil Procedure (Exh.39) and its omission to pass any orders thereon till it disposes off the appeal vitiates its judgment and decree? More so, when the learned Appellate Judge

passes an order thereon subsequently?"

2. At the hearing of this second appeal before my learned predecessor, the grievance made by Shri Thokade appearing for the appellant and elaborated in grounds (g) and (h) is that the lower Appellate Court was seized of an appeal which was directed against the judgment and decree of the Trial Court and during the course of hearing of the First Appeal, an application was made by the present appellant (Exh.39) purporting to be under Order (Order XL R.27) 41 Rule 27 of the Code of Civil Procedure for bringing on record a copy of the Will dated 23rd October, 1996 of deceased Parshuram Raghu Ghare who was the father of the appellant Manohar Parshuram Ghare. This application was filed on 3rd January, 2005 and the lower Appellate Court directed "other side to file say". This order was passed on the same day i.e. on 3rd January, 2005.

3. Reply/say was filed on the very same day by the respondents in the First Appeal and according to the learned Counsel Shri Thokade no orders were passed on this application. The appeal has been dismissed without deciding the issue as to whether additional evidence can be led or not and whether the document which is sought to be produced has any relevance to the controversy before

the lower Appellate Court. It is also urged that the issue as to whether the suit is maintainable on account of non inclusion of all the joint family properties or not was also specifically raised in the grounds of appeal but the same has not been adverted to at all.

4. This Court heard both sides and called for the record and proceedings in order to ascertain whether the application under Order 41 Rule 27 (b) of the Code of Civil Procedure was filed by the present appellant in the lower Court as contended.

5. The Record and Proceedings have now been sent to this Court. Exh.39 is the application filed before the lower Appellate Court. Inspection of the original record and proceedings has been taken by both sides in Court.

6. On perusal of the original record, it appears that the application Exh.39 filed on 3rd January, 2005 and upon which the contesting respondents filed their say, is disposed of by following order.

> "Inadvertantly, it remained to pass the orders. In fact production was not allowed. Hence, I proceed to pass the order as on today.

Order

Document not relevant for deciding the fact in issue. Production not allowed.

Sd/- 30.1.2006"

7. Shri Thokade complains and, in my opinion, rightly that after the second appeal was filed in this Court and record was summoned by this Court's order of 11th October, 2005 this application is sought to be disposed of by the above order. In other words, after the second appeal was filed and listed for admission so also an order issuing notice before admission and calling for record and proceeding was passed the above order is passed. The Court below had disposed off the appeal on 16th March, 2005. Thereafter there was nothing bgefore it which can be said to be pending. It was functus officio. Admittedly, the date of order is 30th January, 2006 which is after filing of the present second appeal. The manner in which this application has been dealt with is most unsatisfactory. There was no occasion for the presiding officer to have endorsed any order on original record once the same was summoned by this Court and in any event a

second appeal is filed challenging the appellate Judgment and Decree. Such a procedure is unknown to law. Dismissal of the appeal by the lower Appellate Court by the impugned judgment and decree means that the entire matter is disposed of and nothing remained on file of that Court. If the main matter is disposed off, then, the application filed for leading additional evidence naturally would not have survived. If the same was not pending in the instant case, then, there was no occasion for the learned Judge to have passed any order below the same. In my view, such an approach defeats the very concept of fairness in judicial proceedings. It is important that the matters are disposed of by judgments and decrees but the cardinal principle that justice must not only be done but seen to be done cannot be brushed aside. The learned Judge, to my mind, has lost sight of a very crucial aspect, namely, sanctity of judicial record and proceedings. By passing an order subsequently and seeking to correct the record when there is no power or authority to do so, the learned Judge has tampered with the same. This is a serious breach of the principle enunciated above. If such a course is permitted litigants would lose faith in the judicial system and administration of justice. The course of justice cannot be allowed to be subverted and polluted in this manner. In the present

case, I would be failing in my duty, if I do not entertain the second appeal on the above substantial question of law as framed above. It is in these circumstances that I have interferred with the impugned Appellate Judgment and Decree.

8. In the light of the above facts and circumstances, the course open to me was to either set aside the entire judgment and decree and remand the matter for fresh hearing and disposal to the lower Appellate Court or to direct that the application Exh.39 be heard and appropriate orders be passed thereon afresh after which the second appeal could be heard in accordance with law. That was the course suggested initially in all fairness by the respondents. However, I enquired of the counsel as to whether they would be prepared, in the present facts and circumstances and following the cardinal principle reproduced above, for restoration of the entire appeal to file, after quashing and setting aside the impugned judgment and decree and direct fresh hearing of the same in expeditious manner. In all fairness this course is not opposed. Since this being the second Appellate and Highest Court inthe State it would send a wrong signal if it ignored this matter as a mere lapse or inadvertence or error of the learned Judge. The submissions canvassed

raise a fundamental issue of faith in the system and I am happy that the learned Counsel have approached it in that spirit.

9. It is rather painful to set aside the judgment and decree on the ground that record and proceedings disclose that the appeal has not been dealt with and disposed of in a just and fair manner but painful as this task is, it has to be performed. Justice cannot be a casualty even in procedural matter. The manner in which the concerned Presiding Officer dealt with the Appeal and ignored a vital application of the appellant leaves lot to be desired. If the entire application is merely kept on file without the litigant being informed of its fate means the lower Appellate Court has failed to discharge its duty as an First Appellate Court on law and facts. The Trial Court’s Judgment and Decree is bare before it and can be interfered with if it is vitiatedd by errors of facts and law.

10. It is only when the original record was summoned by this Court that true state of affairs are disclosed to all. It is in these circumstances and upholding the contention of Shri Thokade I set aside the judgment and order of the lower Appellate Court dated 16th March, 2005

in Reg.Civil Appeal No.391 of 2000. Reg.Civil Appeal No.391 of 2000 is restored to the file of the Court of Additional District Judge at Karad for disposal afresh on merits and in accordance with law uninfluenced by any observations in the impugned judgment.

11. Since the second appeal is allowed on a short substantial question of law it is clarified that I have not touched the other grounds which relate to the merits of the appeal. The rival contentions are expressly kept open in that behalf. Needless to state that the application (Exh.39) is also restored to file and would be heard afresh during the course of the appeal.

12. The District Judge incharge of the subject Court shall assign the matter/appeal to a learned Judge other than the one who has passed the judgment and decree dated 16th March, 2005. Needless to state that the District Judge can himself hear the same. The learned Judge to whom the first appeal is assigned shall endeavour and dispose off the same as expeditiously as possible and within a period of 3 months from the date of receipt of the original record and proceedings.

13. Parties to appear before the lower Appellate Court on

24th July, 2007 at 11 a.m. Record and Proceedings be sent down forthwith.

14. In the light of the aforesaid order Civil Application No.1919 of 2005 does not survive and is disposed off accordingly.

15. Before parting, it is necessary to direct that the entire matter be placed before the Registrar General or the Registrar (SID) of this Court for initiating such action as is permissible in law against the concerned Presiding Officer. Had the learned Judge not passed the order of 30th January, 2006 reproduced above, the act of not passing any order below Exh.39 would not have been viewed with this seriousness. A mere error or omission or inadvertence without anything more must be seen differently. However, the present act cannot be viewed lightly and is not capable of being ignored. If there is allegation of tampering of record by the learned Judge after he/she is functus officio and had no concern with the proceedings, then, that is an act which needs to be dealt with sternly. Such an action will prevent injustice to all concerned and at the same time assist in preserving and protecting the dignity and purity of judicial proceedings. I leave it to the concerned authorities to

take appropriate action so that such incidents are not repeated and the image of the institution so also its dignity and status is not tarnished.

16. Appeal allowed. No order as to costs.

(S.C.DHARMADHIKARI J.)